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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, AND LUTHER W. HIGH,

Appellants,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court is reported in *Highland Farms Dairy, Inc., et al.* v. *Agnew et al.*, 16 Fed. Supp. 575. It will be found on pages 83 to 113, inclusive, of the Record.

II.

JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court upon appeal to review the decree of the District Court is Section 266 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 938) U. S. C. Title 28, Section 380.

This is a suit in equity wherein the plaintiffs prayed for temporary restraining order and an interlocutory and a permanent injunction enjoining and restraining the defendants, as the Milk Commission of the Commonwealth of Virginia, from enforcing against the plaintiffs the provisions of Chapter 357 of the Acts of the General Assembly of Virginia, Session 1934, p. 558, and the rules and regulations adopted by the defendants as such Milk Commission in the Arlington-Alexandria Sales Area, upon the ground of the unconstitutionality of said statute (R. 1-17). A three-Judge court was convened pursuant to the provisions of Section 266 of the Judicial Code as amended (U. S. C. Tit. 28, Sec. 380) (R. 47-48), which court dismissed the amended bill of complaint (R. 113-114).

The date of the decree sought to be reviewed is October 24, 1936 (R. 113-114).

The petition for appeal was filed (R. 115), and the appeal was allowed (R. 117), on November 6, 1936.

III.

STATEMENT OF THE CASE.

Luther W. High and Highland Farms Dairy, Inc., filed their amended bill in equity in the United States District Court for the Eastern District of Virginia wherein they sought an injunction against the enforcement of the provi-

sions of the Act of the Legislature of the Commohwealth of Virginia, approved March 29, 1934 (Acts of Assembly 1934, Chap. 357, p. 558), commonly known as the Milk and Cream Act, upon the grounds, among others, that said Act was invalid under the Constitution of Virginia, and under the Commerce Clause (Article I, Sec. 8) of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States (R. 1-17). The statute involved is hereinafter set out verbatim as Appendix A to this brief (*infra*, pp. 33-45).

The statute contains a preamble wherein it is recited that the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend, and that the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, resulting in a diminished purchasing power of milk producers, breaking down of the orderly production and marketing of milk and cream and an impairment of the agricultural assets supporting the credit structure of the Commonwealth and the subdivisions thereof; that unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and continue in the production, sale and distribution of milk, and milk and cream products, which impair the dairy industry in the Commonwealth and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to their health and welfare; and that in order to protect the well-being of the people of the Commonwealth and to promote the public welfare, public health and public peace the production, transportation, processing, storage, distribution and sale of milk and cream in the Commonwealth is by the Act declared a business affecting the public peace, health and welfare, which should be super-

vised and controlled in the exercise of the police power of the Commonwealth in the manner thereinafter provided.

Section 2 of the Act creates a State Milk Commission, consisting of three members (*infra*, p. 36), and Section 3 (*infra*, p. 37) declares the Commission to be an instrumentality of the Commonwealth vested with the power, among others, to investigate, supervise, regulate and control all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the State; to define and fix the limit of natural market areas and to exercise its powers in any market after a public hearing has been held for such market, and after the Commission determines that it would be to the public interest that it shall exercise its powers therein. The hearing may be had upon its own motion or upon the application of producers supplying a substantial proportion of the milk consumed in the market or of distributors distributing a substantial proportion of the milk consumed in such market.

The Commission may withdraw the exercise of its powers from any market after a public hearing has been held and the Commission determines that it will be to the public interest to do so and is required so to withdraw from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly (Sec. 3-i).

The Commission may, after public hearing and investigation, fix the prices to be paid producers by distributors and may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market. In determining the reasonableness of the prices to be charged, the Commission is to be guided by the cost of production and distribution, including compliance with sanitary regulations, processing, storage and delivery charges, the prices of other foods, and the welfare of the public (Sec. 3-j).

The Commission may require all distributors in any market to be licensed by the Commission for the purpose of carrying out the provisions of the act (Sec. 3-k).

By Section 1, the term "distributor" is defined to include all persons, whether within or without the Commonwealth, who sell or handle milk for resale therein.

Section 3 (k) empowers the Commission to require all distributors in any market designated by the Commission to be licensed by it for the purpose of carrying out the provisions of the Act, and provides that the Commission may decline to grant a license or may suspend or revoke a license already granted, upon due notice and after hearing, and further provides that the Commission may classify licenses and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth. The action of the Commission in refusing, suspending or revoking a license may be reviewed on appeal by the Supreme Court of Appeals (Sec. 6).

Under Section 4, no distributor in any market in which the act is in effect shall buy milk from producers or others for sale within the State, or sell or distribute milk within the State unless such distributor is duly licensed under the Act. It is unlawful for a distributor to buy milk from or sell milk to a distributor who is not so licensed.

Section 8 provides penalties for failure to comply with any rule, regulation or order of the Commission by way of attachment provisions for contempt in the Hustings Court of the city of Richmond.

Section 12 provides that in the event of violation of any provisions of the Act, in addition to any other remedy, the Commission may apply to any Court of record in the city of Richmond for relief by injunction, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13 provides for penalties by fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment for not less than thirty days nor more than one year, or both, for violation of any provision of the act or of any license issued by the Commission, and that each day during which such violation shall continue shall be deemed a separate violation.

Section 14 provides that no provision of the act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the Constitution and the laws of the United States enacted pursuant thereto.

Section 16 provides that if any section, clause, or sentence or paragraph be declared unconstitutional for any reason the remainder of the act shall not be affected thereby.

Section 17 provides that the period of public emergency during which the act shall be effective shall be until such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session, the date so designated by a proclamation of the Governor, and further recites that, an emergency existing, the act shall be in force from its passage. The last mentioned provision being pursuant to the provisions of Section 53 of the Constitution of Virginia as Amended in 1902.

The plaintiffs in the Court below were Highland Farms Dairy, Incorporated, a Virginia corporation, and Luther W. High, a resident of the District of Columbia, and the defendants were J. S. Agnew, Kone Brugh and T. R. Snavely, as members of the Milk Commission of the Commonwealth of Virginia (R. 49).

The case came on to be heard upon a stipulation of facts, no testimony being taken on behalf of any of the parties (R. 48-58, 113).

It was stipulated that the plaintiff Highland Farms Dairy, Inc., is and since July 1, 1935 has been operating a creamery for the pasteurizing and processing of milk in the District of Columbia, which milk it purchases, chiefly in can lots, under direct contracts from farmers and producers in the District of Columbia, Maryland and Virginia, for delivery to it in the District of Columbia, the transportation thereof being by the farmers or producers, at their cost. About 19½% of its purchases are from farmers or producers in Virginia and substantially all of the milk purchased from farmers or producers in Virginia is produced in the so-called Arlington-Alexandria Production Area (R. 49).

The milk when received from Virginia is mingled with the milk received by the corporate plaintiff from farmers and producers in the District of Columbia and Maryland and is bottled, and the entire output of the milk so bottled is sold by the corporate plaintiff to the plaintiff Luther W. High to be sold at retail by him in Virginia as well as in the District of Columbia and Maryland. High is engaged in the business of operating retail stores for the sale of ice cream, milk and other dairy products in the District of Columbia, Maryland, and Virginia, and in the course and conduct thereof, engages in the business of handling and selling bottled milk in the Arlington-Alexandria Sales Area (R. 51).

By reason of the commingling of the milk at the creamery it is not possible to determine what portion, if any, of the milk delivered to High for sale by him in said Arlington-Alexandria area in Virginia was produced in Virginia (R. 50). The prices at which the corporate plaintiff sells to High (R. 50) and the prices at which High sells at retail (R. 51) are lower than the schedule of retail and wholesale selling prices promulgated by the Milk Commission for the Arlington-Alexandria Sales Area (R. 42).

The plaintiff High purchases in the District of Columbia, under contract, all of the output of bottled milk of the corporate plaintiff, and does not purchase from any other source, while the corporate plaintiff sells all of its output of bottled milk to High (R. 51).

The plaintiff High operates on the so-called "cash and carry" plan, making no deliveries outside of his stores, and selling only for cash, plus a cash deposit on the bottles. The differential between the prices charged by High and the prices charged by other distributors who permit charge accounts and furnish delivery service is an essential factor in his method of competition (R. 52).

No legislative investigation into the condition of the milk industry of Virginia was made or conducted by or at the instance of the General Assembly of Virginia as the basis for the enactment of the statute in question (R. 52-53).

On February 20, 1936, the State Milk Commission met at Richmond to consider the establishment of the milk market for the Arlington-Alexandria area (R. 60A), and thereafter the Milk Commission established the Arlington-Alexandria Milk Market, and, by regulations, required licenses and fixed minimum prices to be charged by distributors therein (R. 38, 39, 42).

The plaintiff Highland Farms Dairy, Inc., has continuously sold bottled milk to the plaintiff High at prices lower than the minimum established by the Milk Commission for the Arlington-Alexandria Milk Area, and the plaintiff High has continuously sold bottled milk to consumers at prices lower than the minimum established therefor (R. 56). The Milk Commission has threatened to invoke against the plaintiff High the remedies by injunction proceedings as provided by the Milk and Cream Act, to restrain him from continuing his business as a milk dealer without having the license thereby required (R. 56-57; 119-120). No action has been taken or threatened against the plaintiff Highland Farms Dairy, Inc. (R. 57).

The Milk Commission has established sixteen marketing areas for the State of Virginia, which are shown on Exhibit 2 attached to the stipulation of facts (R. 60A) by the shaded portions thereof, and, as will appear from said Exhibit, the marketing areas thus established are roughly equal to one-half of the area of the State. These markets were established at various times between June 15, 1934 and May 16, 1936 (Exhibit 2, R. 60A).

On June 2, 1936, a demand was made on the plaintiff High, through the manager of one of his stores in Alexandria (within the Arlington-Alexandria area) that he apply for a distributor's license (R. 64), and on June 6, 1936 there was transmitted to his attorneys a copy of a bill of complaint proposed to be filed, and a proposed decree, to be presented to the Law and Equity Court of Richmond on June 8, 1936. The proposed bill sought to enjoin the plaintiff High and the managers of his four stores in the Arlington-Alexandria milk market from selling milk in said area at less than thirteen cents per quart retail, the minimum price fixed by the Milk Commission (R. 64; 67-70).

IV.

SPECIFICATION OF ERRORS.

(R. 115).

1. The District Court erred in holding that the Act of the General Assembly of Virginia, known as the Milk and Cream Act, approved March 29, 1934, was a proper exercise of the police power of the State.

2. The District Court erred in failing to hold that the said Act was invalid as an improper delegation of legislative power to the Milk Commission.

3. The District Court erred in not holding that the powers conferred upon the Commission involved a denial of equal protection of the laws and a denial of due process in

contravention of the 14th Amendment to the Constitution of the United States.

4. The District Court erred in not holding that the acts and regulations adopted by the Milk Commission were invalid because they constituted an interference on the part of the State with interstate commerce.

V.

ARGUMENT.

Summary of the Argument.

Point A.

No facts existed or exist justifying the enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature has not found the existence of such facts, but, on the contrary, has undertaken to delegate to the Milk Commission the power of determining the existence *vel non* of such facts as to particular areas within the State.

Point B.

The Virginia statute is unconstitutional as constituting an improper delegation of legislative power to an administrative body.

Point C.

There has not been a suitable legislative investigation or determination of the facts the existence whereof is necessary to sustain the validity of the statute.

Point D.

The licensing provisions are invalid, as prescribing no standard for the grant, refusal or revocation of licenses.

Point E.

The enforcement of the statute will be an interference with interstate commerce.

Point F.

If the statute is void by reason of all or any of the defects herein complained of, it is void in its entirety, notwithstanding the saving clause contained in Section 16.

POINT A.

No Facts Existed or Exist Justifying the Enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature Has Not Found the Existence of Such Facts, but on the Contrary, Has Undertaken to Delegate to the Milk Commission the Power of Determining the Existence vel non of Such Facts as to Particular Areas Within the State.

Emergency does not create legislative power, but may furnish the occasion for the exercise of power.

Wilson v. *New*, 243 U. S. 332, 348;

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398, 425.

A declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled to great respect, but a legislative declaration of facts that are material only as the ground for enacting a rule of law, may not be held conclusive by the courts.

Block v. *Hirsh*, 256 U. S. 135, 154.

When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, but this is a presumption of fact and is rebuttable.

Borden's Farm Products v. *Baldwin*, 293 U. S. 194, 209.

Applying the foregoing principles to the case at bar, we find that the Virginia Legislature has passed a statute for

the control of the milk and cream business, containing a preamble intended to show the existence of facts which justify the enactment. But whatever *prima facie* validity the Act might have is negatived by the terms of the Act itself. The Act, although purporting to find the existence of the facts sought to be sufficient to sustain its validity, is not in fact an exercise of such power as the Legislature might have if the existence of these facts were granted, but, on the contrary, provides in Section 3 (i) (*infra*, p. 38) that the Milk Commission shall not exercise its powers in any market until it determines after a hearing, that it will be to the public interest that it so exercise its powers in such market; and a further abdication of legislative power is to be found in the same Section whereby the Commission is given the right to withdraw the exercise of its powers from any market upon a determination that it would be to the public interest so to withdraw, and the provision which requires the Commission to withdraw from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market, acting jointly.

Therein lies an important and vital distinction between the statute here under consideration and the New York statute (Chapter 158 of the Laws of New York, 1933) which was considered and upheld by this Court in *Nebbia* v. *New York*, 291 U. S. 502.

That statute created a milk control board with power "to supervise and regulate the entire milk industry of New York State and a direction to ascertain by investigation and proofs what prices for milk in the several localities and markets of the State will best protect the milk industry in the State, and to fix by official order the maximum and minimum wholesale and retail prices to be charged for milk within the State, wheresoever produced." In sustaining

the validity of the New York statute, this Court said (p. 538):

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public."

Can it be said that the Legislature of Virginia made any finding or determination of facts, express or implicit, or has expressed a policy, when it is considered that the Commission is sought to be given the power to determine in what portion or portions of the State it shall exercise its powers, with the implication that it may decline to exercise its powers anywhere within the State and is empowered to withdraw from any or all areas in which it shall have undertaken to exercise its powers, and may be required to withdraw from any area at the will of the producers and distributors of a major portion of the milk produced and distributed in such area? How can the Commission determine whether it will be active in, or withdraw from any market except upon a determination by it as to the advisability of such a course—a legislative function? In *Nebbia* v. *New York*, 291 U. S. 502, *supra*, the New York Legislature had said in effect, "Upon the basis of facts which we know and declare, this statute is necessary." The Virginia Legislature, on the other hand, has said in effect, "Perhaps there is need for this legislation in some parts of the State, in all of the State, or in no part of the State; we make no finding and express no opinion on the point. We create

a commission and leave it to that commission to ascertain those facts which are necessary for the validity of regulation of the milk and cream industry, and to determine whether the public interest requires regulation, and leave it to it to determine and express the policy of the State."

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, there was involved the validity under the 14th Amendment of a statute of the State of Kansas which created an industrial court for the adjudication of labor disputes in certain industries declared to be effected by a public interest, and to fix wages and other terms for the future conduct of the industry.

The validity of the statute was sought to be upheld on the ground that the power to pass the statute rested upon the existence of a temporary emergency. This Court pointed out the distinction between the existence of an emergency as found by the legislature and as found by an administrative body, and held that whatever might have been the situation if the existence of the emergency had been legislatively determined, a statute which undertook to vest in an administrative body the power to determine whether there was an emergency was not valid under the 14th Amendment. On this point this Court said (p. 542):

> "Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor."

We submit that the quoted language fits the situation in the case at bar precisely. The Legislature of Virginia has not determined that a danger exists, but has determined that there is a possibility that it exists, in all, none, or some parts of the Commonwealth, and has sought to empower the Milk

Commission to determine that which should be legislatively determined.

POINT B.

The Virginia Statute is Unconstitutional as Constituting an Improper Delegation of Legislative Power to an Administrative Body.

As we have pointed out under Point A, the statute purports to empower the Milk Commission to determine, as to various portions of the Commonwealth, whether it will be to the public interest that the milk industry be regulated in such areas, without prescribing criteria for the guidance and control of the Commission. As the determination of policy is a legislative function, the attempt to delegate it to an administrative body is invalid.

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."
>
> *Wichita R. R. & Light Co.* v. *Public Utilities Commission of the State of Kansas,* 260 U. S. 48, 59.

We concede the principle that the legislature, upon determining the wisdom, policy or expediency of legislation in view of the existence of a certain set of facts, may delegate to the executive or to a commission the power of determining whether such facts exist. Such facts must be objective facts and not a determination of expediency or policy, such consideration being solely for the legislature.

Field v. *Clark,* 143 U. S. 649;

Hampton v. *United States,* 276 U. S. 394.

As was held by this Court in *Nebbia* v. *New York,* 291 U. S. 502, *supra,* the existence of the facts necessary for regulatory legislation of the kind here under consideration

is a question for determination by the legislature; and this finding may be expressed in the statute itself or may be presumed in the absence of a showing to the contrary, but the statute here under consideration purports to invest the Commission with the power of determining the advisability and necessity of milk control in particular areas, not by an ascertainment of objective facts, which it may be assumed would be the same no matter by whom found, but by a determination of the expediency, advisability and necessity of regulation, which are not objective facts, and as to which there may be differences of opinion calling for the exercise of a legislative, as distinguished from an administrative or fact-finding power.

So far from coming under the principle laid down in *Field* v. *Clark*, 143 U. S. 649 and *Hampton* v. *United States*, 276 U. S. 394, *supra*, this statute comes under the condemnation of the decisions of this Court in *Panama Refining Company* v. *Ryan*, 293 U. S. 388 and *Schechter* v. *United States*, 295 U. S. 495.

In *Panama Refining Company* v. *Ryan*, 293 U. S. 388, *supra*, there was involved the validity of Section 9(c) of Title 1 of the Act of Congress of June 16, 1933 (48 Stat. L. 195 U. S. C. Tit. 15, Sec. 709), authorizing the President to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof, produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn by any State law or valid regulation prescribed thereunder by the duly authorized agency of a State, but containing no definition of the circumstances and conditions in which the transportation was to be allowed or prohibited. This Court assumed that the validity of this provision depended upon whether the power of the President was to determine a policy or to carry into effect the policy declared by Congress and said (p. 415):

"Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; and whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

• • • • • • •

"Section 9(c) does not state whether, or not what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress, in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."

For this and other reasons, the law was held invalid as an improper delegation of legislative powers to the Executive.

Schechter Poultry Corporation v. *United States*, 295 U. S. 495, *supra*, involved the validity of the National Industrial Recovery Act of June 16, 1933 (48 Stat. L. 195; U. S. C. Tit. 15, Sec. 703), which purported to give to the President power, upon the application to him by one or more trade or industrial associations or groups, to approve a code or codes of fair competition for such trade or industry if the President found that such associations or groups impose no inequitable restrictions or admission to membership and that such codes are not designed to promote monopolies. After discussing the general principle involved, this Court said (p. 530):

"Accordingly, we look to the statute to see whether Congress has overstepped these limitations, • • •

> whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards has attempted to transfer that function to others."

This Court held the Act unconstitutional as attempting to confer upon the President the legislative function of determination of policy, without the setting up of objective standards.

Section 3 (j) of the Virginia Act provides that

> "The Commission, after public hearing and investigation may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the Commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

There is a distinct analogy between that section and the provisions of Section 551 (8) of the New York minimum wage law which this Court has held to be invalid under the 14th Amendment. (*Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 605), and which provided that in establishing a minimum fair wage for any service or class of service the Commissioner and the Wage Board may take into account all relevant circumstances affecting the value of the service or class of service rendered and may be guided by like considerations as would guide a Court in a suit for the reasonable value of services rendered where services are rendered

at the request of an employee without contract as to the amount of the wage to be paid, and may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards. The New York Court of Appeals had construed the prescribed standard to include cost of living, and this Court, feeling itself bound by that interpretation, held the law to be violative of the 14th Amendment. The Virginia Milk Act does not depend on any judicial interpretation that the cost of living of producers of, and dealers in, milk enters into the prescribed standard, for the statute expressly says that the Commission shall consider, in addition to the cost of production and distribution, the prices of other foods and the welfare of the general public (Sec. 3-j).

The provision that the Commission shall take into consideration also the welfare of the general public, is a standard so broad as to amount to no standard at all. Section 312 of the New York milk law which was upheld in *Nebbia* v. *New York*, 291 U. S. 502, *supra*, provided that the board shall ascertain by investigation and proofs what prices for milk in the several localities and markets of the State and under varying conditions will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk to adults and minors in the State, and shall take into consideration all conditions affecting the milk industry, including the amount necessary to allow a reasonable return to the producer and to the milk dealer. We submit that the New York statute goes to the verge of legislative power and that any statute of like purpose which fails to prescribe standards at least as rigid as those prescribed by the New York law cannot be upheld under the 14th Amendment.

Not only does the statute seek to delegate legislative power to an administrative body, but there is a further dele-

gation of legislative powers to the persons engaged in the industry. We refer to the provision of Section 3 (i) (*infra*, p. 38) that the Commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers measured by volume of milk produced and a majority of the distributors measured by volume of milk distributed in said market, acting jointly. The consequence of this provision could be that two persons, or associations, one producing the major portion of the milk produced in a given area, and the other distributing the major portion thereof, can nullify the statute as to that area by demanding that the Commission withdraw therefrom. This is carrying the delegation of legislative powers almost to its ultimate possible limit.

In *Schechter* v. *United States*, 295 U. S. 495, *supra*, this Court said (p. 537):

> "But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deemed to be wise and beneficent for the rehabilitation and expansion of their trade or industry? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? • • • Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

Such a delegation of power "unknown to our law" is to be found in the provision which permits persons in the milk and cream industry to decide whether or not a statute of the State shall be enforced in a particular area.

In *Eubank* v. *Richmond*, 226 U. S. 137, there was involved the validity, under the 14th Amendment, of an ordinance of the City of Richmond which provided that whenever the

owners of two-thirds of property abutting on any street should in writing request the committee on streets to establish a building line on the side of the square on which their property fronts, the committee shall establish such line so that the same shall be not less than five feet nor more than thirty feet from the street line, and that no buildings shall be constructed facing such building lines except within the limitation thereof. In holding the statute to be invalid under the 14th Amendment, this Court said (p. 143):

> "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. • • • One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously."

So in the instant case, conceivably a small group of persons, and even two persons, one controlling a major portion of the milk produced, and the other controlling a major portion of the milk distributed (who might conceivably be one and the same person or association) can nullify an act of the Legislature for any reason or for no reason, or solely in their own interest or for the purpose of creating or maintaining a monopoly.

POINT C.

There Has Not Been a Suitable Legislative Investigation or Determination of the Facts the Existence Whereof is Necessary to Sustain the Validity of the Statute.

This Court has recognized the delicacy of the regulation of businesses not by their nature chargeable with a public interest, and has sustained such legislation where based on the particular facts and circumstances existing at the time of the enactment of the law and of its enforcement.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398;
Nebbia v. *New York*, 291 U. S. 502;
Block v. *Hirsh*, 256 U. S. 135;
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194;
Chastleton v. *Sinclair*, 264 U. S. 543;
Wilson v. *New*, 243 U. S. 332.

Where particular facts and circumstances did not so exist, such legislation has been declared unconstitutional.

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson et al.* v. *Banton*, 273 U. S. 418; and in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, dealing with the attempt of the State to control the manufacture and sale of ice, this Court held that this business was private and not affected with a public interest and likened it to the "business of the grocer, the *dairyman*, the butcher or the baker." (Italics supplied.)

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, *supra*, this Court said (p. 537):

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by a state regulation."

In *Nebbia* v. *New York*, 291 U. S. 502, *supra*, this Court commented (p. 516) at length upon the fact that the New York legislation had been passed, after an investigation by a joint legislative committee, which had held 13 public hearings, at which 254 witnesses had testified, 2350 typewritten pages of testimony had been taken and exhibits submitted, and an extensive research program prosecuted by experts and official bodies and employees of the State and municipalities, and the receipt of detailed reports from over 100 distributors of milk, the information contained in which had been analyzed, resulting in a report covering 473 closely printed pages.

In *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 262, this Court referred to its decision in the *Nebbia* case as having held that the 14th Amendment to the Constitution did not prevent the fixing of maximum and minimum prices for milk *in the circumstances existing in the State of New York in 1933.*

No investigation of any kind was made by the Legislature of Virginia, or by any official body prior to the passage of the statute (R. 53). The stipulation of facts shows (R. 53) that the bill which subsequently became the Act was introduced in the House of Delegates on the morning of March 10, 1934, accompanied by a letter from the Governor (R. 61) bearing the same date, in which he transmitted a draft of the bill and urged its passage; the bill was reported to the Committee on Agriculture and Mining, which was immediately discharged from consideration thereof, printings and constitutional readings were waived and the bill was adopted by the House and sent to the Senate on the same morning. The Senate on the same day referred the bill to the Committee on Agriculture and Mining, immediately discharged the Committee from consideration thereof, dispensed with the constitutional readings and

enacted the same on the afternoon of the same day upon which the bill had been introduced (R. 53). The Act was approved by the Governor on March 29, 1934.

We submit that this hurried enactment of the statute, to say the least, coupled with the terms of the Act itself, which show that the Legislature had not determined any policy except the policy of permitting the Milk Commission to determine its policy, are sufficient to deprive the statute of whatever presumption in favor of its validity might otherwise exist.

The statute may not be upheld as emergency legislation, as it does not cover, and does not purport to cover any emergency situation, but is permanent legislation.

The New York Milk Act became effective immediately throughout the State and its life was limited to a little less than one year (sec. 319). The Virginia statute becomes effective, if at all, at the will of the Commission, and it has no definite time limitation.

The New York Milk Act was enacted as and "was adopted to meet an emergency", *People* v. *Nebbia*, 262 N. Y. 259; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, *supra;* rent legislation has been upheld as emergency legislation. "A limit in time to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change", *Block* v. *Hirsh*, 256 U. S. 135; *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, *supra*. On the other hand the New York minimum wage law was denounced by this Court as violative of the 14th Amendment for the reason, among others, that it was not emergency legislation, but was intended to express the permanent policy of the State of New York. *Morehead* v. *New York ex rel, Tipaldo*, 298 U. S. 587, 615 (*supra*).

In *Worthen & Co.* v. *Thomas*, 292 U. S. 426, this Court held that a statute of Arkansas exempting from seizure

under judicial process moneys paid or payable under liability and disability insurance policies was, as to creditors existing at the time of the enactment of the statute, invalid under the Fourteenth Amendment. The Court distinguished the statute involved in that case from the Minnesota mortgage moratorium law which had been upheld in the *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, *supra*, upon the ground that the Minnesota mortgage moratorium law had been enacted in view of an existing emergency and was temporary in character, whereas the Arkansas statute was permanent legislation, saying (p. 434):

> "• • • The relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the act contains no limitations as to time, amount, circumstances or need."

POINT D.

The Licensing Provisions Are Invalid, as Prescribing No Standard for the Grant, Refusal or Revocation of Licenses.

Section 3 (k) (*infra*, p. 40) provides that the Commission may require all distributors in any market designated by it to be licensed by the Commission for the purpose of carrying out the provisions of the act, and that the Commission may decline to grant a license or may suspend or revoke a license already granted, upon due notice and after a hearing; and Section 4 (*infra*, p. 41) prohibits distributors from buying milk from any source and from selling it within the Commonwealth unless they have been licensed. Not a word will be found in the statute which lays down any rules for the guidance of the Commission in the granting, withholding or revocation of licenses; the power is apparently given to the Commission to grant, withhold or revoke licenses at will, for no reason, or for any reason, or because it considers that the services of a particular dis-

tributor in a given area are not needed, which last-named consideration would be invalid under the decision of this Court in *New State Ice Company* v. *Liebmann*, 285 U. S. 262, *supra*.

Section 6 (*infra*, p. 41) provides that any order of the Commission in refusing to issue a license or suspending or revoking a license may be reviewed on appeal to the Supreme Court of Appeals. But this provision is wholly useless if the provisions of Section 3 (k) are given effect, because that Section gives the Commission an unlimited and unrestrained power in regard to licenses. Consequently no appeal to the Court could be effective because it could in no case be pointed out that the action of the Commission contravenes any statutory prescription or limitation of its powers, as there are no such prescriptions or limitations.

POINT E.

The Enforcement of the Statute Will be an Interference With Interstate Commerce.

The statute provides (Section 4) (*infra*, p. 41) that all distributors whose milk is sold within the Commonwealth of Virginia must be licensed, and Section 1 defines distributors as including among others, persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia. As thus worded, the statute applies to persons, such as the plaintiff Highland Farms Dairy, Inc., who buy milk in Virginia for delivery in the District of Columbia, or some other State, for ultimate resale as fluid milk in the Commonwealth of Virginia, and to persons in the situation of the plaintiff High, who purchase in the District of Columbia for resale in Virginia. The restriction is not only on the sale of milk in Virginia, but Section 4 expressly says that no distributor shall buy milk from producers or others, for sale within the Commonwealth, unless such distributor is licensed.

This makes the act of a dealer licensed under the act in buying milk in interstate commerce unlawful unless the person from whom the milk is purchased is also licensed.

Section 9 of the act (*infra*, p. 42) provides that the Milk Commission shall collect the money required for its budget from the local milk boards in the form of monthly assessments, which shall not exceed 2¢ per hundred pounds of milk handled in each market in which the provisions of the act are in operation; and Section 11 (b) (*infra*, p. 43) provides that the expenses of the milk board, including the expenses levied by the State Milk Market Commission, shall be met by an assessment of not over 2¢ per hundred pounds of milk and/or cream handled by distributors, and not over 2¢ per hundred pounds of milk and/or cream sold by producers, and that all assessments shall be paid at the time the distributors pay the producers for the milk. It thus appears that this tax or so-called assessment is a direct burden on interstate commerce in those cases where Virginia distributors purchase their milk from out-of-State producers. The assessment, it will be noted, is not based on sales by the distributor within the State, but on purchases thereof from producers, whether within or without the State. This constitutes a tax on interstate commerce, so far as purchases from out-of-State producers are concerned.

In *State Board of Equalization of California* v. *Young's Market Company*, decided November 9, 1936, 81 Advance Opinions 37, this Court had under consideration a statute of California under which wholesale dealers in beer importing the same into California from other States were required to pay a license fee of $50. The validity of the statute was upheld by reason of the provisions of the 21st Amendment, Section 2, whereof prohibits the transportation or importation into any State, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof. The sig-

nificance of the decision of this Court in that case is apparent from the following quotation therefrom:

> "Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege [importation of beer]. The imposition would have been avoided, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any State except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the Twenty-first Amendment, have been permissible even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."

In *Lemke* v. *Farmers' Grain Company*, 258 U. S. 50, this Court held unconstitutional a North Dakota statute requiring purchasers of grain to obtain a license from a State inspector and to act under a defined system of grading, inspection and weighing, and subjecting the prices paid and profits made to regulation by the State inspector. The Court said (p. 59):

> "• • • the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce"
>
> • • • • • • •
>
> "It is alleged that such legislation is in the interest of the grain growers, and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach

upon the field of interstate commerce, placed by the Constitution under Federal control."

Nor is the act saved from invalidity in this regard by Section 14 (*infra*, p. 44), which provides that no provision thereof shall apply or be construed to apply to foreign or interstate commerce except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto. If this statute be so construed as to exempt from the assessment purchases made by Virginia distributors from out of State producers, we then have an inequality and an advantage enjoyed by distributors who purchase from sources out of the State over those distributors who make their purchases within the State, thus violating that clause of the 14th Amendment which prohibits the State from denying to any person within its jurisdiction the equal protection of the laws.

In *Bowman* v. *Continental Oil Company*, 256 U. S. 642, in which this Court held void a statute of New Mexico imposing upon distributors of gasoline an excise of 2¢ for each gallon sold and an annual license tax of $50.00, the State Attorney General averred that the State and its officers charged with enforcement of the law, did not construe the act as affecting interstate commerce, and had no purpose or intention to enforce it so as to do so. The Court dismissed this contention of the defendant, saying (p. 648):

"No doubt the State might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the State has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as ap-

> pears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence it cannot be enforced at all."

It is submitted, therefore, that the disavowal by the Milk Commission of intent to enforce the assessment against interstate business (R. 57) does not avoid a burden upon interstate commerce, since the assessment, if imposed at all, is required by the terms (Section 11 (b)) the Milk Act itself to be imposed, and paid, before the milk is sold to the consumer. It follows therefore, that the assessment cannot be imposed at all in this case without interfering with interstate commerce.

Point F

If the Statute is Void by Reason of All or Any of the Defects Herein Complained of, it is Void in its Entirety, Notwithstanding the Saving Clause Contained in Section 16.

Section 4 (*infra*, p. 41) provides among other things, that it shall be unlawful for a distributor to buy milk from a distributor who is not licensed as required by the act. The term "distributor" is defined by Section 1 (II) to include persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia. Applying this portion of the statute to the plaintiffs in this suit, we find that High, who is a distributor within the State of Virginia, may not without violating the statute and incurring the penalties thereby prescribed, purchase milk in the District of Columbia from the plaintiff Highland Farms Dairy, because under the statutory definition Highland Farms Dairy is a distributor which handles milk for resale as fluid milk in the Common-

wealth of Virginia, and it is not licensed. This is not only a restriction upon interstate commerce, but is an absolute prohibition thereof if one of the parties to the action, a nonresident of the State and not engaged in business therein, has failed to obtain a license under the laws of the State.

Section 16 provides that if any section, clause, sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby. Where the statute contains such a provision, its effect is to reverse the presumption that the Legislature intends an act to be effective as an entirety and that if any provision thereof be unconstitutional, the remaining portions fall with it, and to create a presumption of separability, thereby shifting the burden to those who assail the statute to show its inseparability. Under either rule the determination is reached by applying the test, What was the intent of the law makers?

Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent to the determination of which the statutory provision becomes an aid. But it is an aid merely; not an inexorable command. *Dorchy* v. *Kansas*, 264 U. S. 286, 290.

The presumption in favor of separability does not authorize the Court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

> "The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and to uphold another part as separable they must not be mutually dependent upon one another."
>
> *Carter* v. *Carter Coal Co.*, 208 U. S. 238, 312.

We submit that the statute here under consideration is so drawn that if those portions of it to which we have herein

directed the attention of the Court are invalid, the whole statute must necessarily fall, since the whole statute deals with one subject and undertakes to prescribe a comprehensive plan for the regulation of the milk industry.

If, therefore, the provisions as to licensing fail, the whole act must fail. Section 3 (k) (*infra*, p. 40) provides that the Commission may require all distributors in any market designated by the Commission to be licensed by the Commission *for the purpose of carrying out the provisions of the act*, and may issue licenses to distributors to process or store, or sell milk to a particular city or village or to a particular market or markets; and Section 4 (*infra*, p. 41) prohibits distributors in markets in which the provisions of the act are in effect to buy milk for sale within the Commonwealth unless such distributor is licensed, and makes it unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed, and makes it unlawful for any distributor to deal in or handle milk if he has reason to believe it has previously been dealt in or handled in violation of the act. It will thus be seen that the licensing feature is the mechanism by which the statute is to be made effective. If the provisions in regard to the licensing are stricken from the act, the act becomes a futility in its entirety, and Section 16 cannot save it.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that the decree of the Court below should be reversed and that the cause should be remanded with directions to enter a decree in accordance with the prayers of the amended bill.

Respectfully submitted,

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APPENDIX A.

Milk and Cream Act.

CHAP. 357.—AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents and employees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act. [H B 396]

Approved March 29, 1934.

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political subdivisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the

health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Definitions.—As used in this act, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

"Person" means any person, firm, corporation or association.

"Commission" means the milk commission created by this act.

"Distributor" means any of the following persons engaged in the business of distributing, marketing, or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Commonwealth of Virginia:

I. Persons, irrespective of whether any such person is a producer:

(a) who pasteurize or bottle milk or process milk into fluid milk;

(b) who sell and/or market fluid milk at wholesale or retail

(1) to hotels, restaurants, stores or other establishments for consumption on the premises

(2) to stores or other establishments for resale, or

(3) to consumers;

(c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.

II. Persons wherever located or operating, whether within or without the Commonwealth of Virginia, who pur-

chase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia.

"Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk for sale as fluid milk in the Commonwealth of Virginia.

"Producer-distributor" means a distributor who handles only milk produced by himself.

"Consumer" means any person, other than a milk distributor who purchases milk for human consumption.

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

"Licensee" means a licensed milk distributor.

"Milk" means the clean lacteal secretion obtained by the complete milking of one or more healthy cows properly fed, housed and kept; including milk that is cooled, pasteurized, standarized or otherwise processed with a view of selling it as fluid milk, cream, buttermilk (either cultured or natural buttermilk, and including cultured whole milk in its several trade forms) and skimmed milk; said term excludes the lacteal secretion of one or more dairy animals where lacteal secretion is sold or intended to be sold for any other purpose..

"Subsidiary" means any person of, or over whom or which a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner.

"Affiliate" means any person and/or subsidiary thereof, who has, either directly or indirectly, actual or legal control, over a distributor, whether by stock ownership or in any other manner.

"Board" means the local agency authorized by this act to administer the operation of the act in each market area operating under the provisions of this act, to be known as the "milk board" of the particular market area in which it functions.

"Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence,

or other data, pertaining to the business of the person in question.

"Health authorities" includes the State Board of Health, the Virginia Dairy and Food Division of the State Department of Agriculture and Immigration and the Director thereof, and the local health authorities.

"Sanitary regulations" includes all laws and ordinances relating to the production, handling, transportation, distribution and sale of milk and, so far as applicable thereto, the State sanitary code and lawful regulations adopted by the dairy and food divisions, or by the board of health of any county or municipality.

Section 2. Milk Commission.—(a) There is hereby created a Milk Commission, consisting of three members, two of whom shall be producers of milk who are not directly or indirectly engaged in the distribution thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom, who shall be appointed by the Governor of Virginia to hold office at the pleasure of the Governor and may be removed at any time by the Governor. Any vacancies occurring shall be filled by appointment by the Governor. One member of said commission shall act as chairman, as designated by the Governor. The technical and other services for such commission shall be performed, so far as practicable, by forces and officers in the Department of Agriculture and Immigration, the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station, without additional compensation. The Milk Commission may appoint and, at pleasure, remove the secretary of the Milk Commission and any such additional technical and other assistants and employees as may be necessary to carry out the provisions of this act, and to prescribe their powers and duties.

(b) The members of the Milk Commission shall be paid each the sum of ten dollars per day for each day actually spent in the performance of their official duties, plus their actual and necessary expenses.

(c) The commission shall fix the compensation of the secretary of the Milk Commission and other employees.

(d) The secretary shall, subject to the limitations herein contained and the rules and regulations of the commission, enforce the provisions of this act, but no official act shall be taken, rule or regulation be promulgated, or official order made or enforced, with respect to the provisions of this act, without the approval of the majority of the members of the commission.

(e) The principal offices of the commission shall be in the city of Richmond, in rooms assigned by the Director of the Division of Grounds and Buildings.

(f) Two members of the commission shall constitute a quorum.

Section 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(d) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors, as between themselves, or that may exist between them as groups.

(e) To examine into the business, books and accounts of any milk producer, association of producers or milk distributors, their affiliates or subsidiaries; to issue subpoenas

to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpoena any other person from whom information is desired.

(f) To take depositions of witnesses within, or without, the Commonwealth. Any member of the commission, or any employee designated by the commission, may administer oaths to witnesses and sign and issue subpoenas.

(g) To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act. Every rule or order of the commission shall be posted for inspection in the main office of the commission, and a certified copy filed in the office of the Commissioner of Agriculture. An order, applying only to a person or persons named therein, shall be served on the person or persons affected. An order, herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby; or, in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served. The posting in the main office of the commission of any rule and of any order, not herein required to be served, and such filing in the office of the Commissioner of Agriculture, shall constitute due and sufficient notice to all persons affected by such rule or order.

(h) The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market. The commission may, on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying

in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market. The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of Virginia, supplying in the judgment of the commission, a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly.

(j) The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk.

In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

(k) The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth.

(l) Any member of the commission, or employee designated for the purpose, shall have access to, and may enter at all reasonable hours, all places where milk is stored, bottled or manufactured into food products. Any member of this board, or designated employee shall have the power to inspect books and records in any place within the Commonwealth for the purpose of ascertaining facts to enable the board to administer this act, and all such information shall be confidential, unless the parties concerned agree to its being given out. The commission may combine such information for any market or markets and make it public.

(m) The commission may define what shall constitute a natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; provided, that producers, producer-distributors, or their successors now shipping milk to any market may continue so to do until they voluntarily discontinue shipping to the designated milk market.

(n) The commission may delegate such of the powers given it by this act as it sees fit to the milk board in any

particular market area, for the purpose of carrying out the provisions of this act within said market area.

(o) Each licensee shall, from time to time, as required by the commission, furnish to the commission verified reports containing such information as the commission may require.

Section 4. No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act.

Section 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

Section 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

Section 7. The licenses required by this act shall be in addition to any other licenses required by existing laws of the Commonwealth of Virginia or by any municipal ordinance. Nothing in this act shall be construed to conflict with or repeal any laws now in force in the Commonwealth of Virginia relating to any board of health or sanitary code now in force in this Commonwealth or in any municipality thereof, nor any municipal ordinances relating to the inspection, grading, production, sale or distribution of milk.

Section 8. Any person failing or refusing to comply with any subpoena issued by the commission or pursuant to its

authority, shall be deemed guilty of a misdemeanor, and upon conviction, may be punished by a fine not exceeding one hundred dollars or by imprisonment not exceeding ninety days, or both, and each day during which such violation shall continue shall be deemed a separate offense. In the event any person shall fail to comply with any rule, regulation or order of the commission, or obey any subpoena issued thereby, or in the event of the refusal of any witness to testify to any matter concerning which he lawfully may be interrogated by the commission or its representative, it shall be the duty of the hustings court of the city of Richmond, or judge thereof, upon application of the commission, to compel obedience by attachment proceeding for contempt as in the case of disobedience of the requirements of a subpoena issued from said court, refusal to testify therein, or disobedience of an order or decree of such court. The proceedings herein authorized in the hustings court to compel obedience shall be in addition to the provisions of this section defining what shall constitute a misdemeanor and providing and prescribing the punishment therefor.

Section 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

Section 10. All receipts from assessments paid under this act shall be paid by the commission to the State Treasurer and shall be placed by the State Treasurer in the general fund to the credit of an account to be known as the "Milk Commission account" and such amount as may be necessary, and no more, hereby is appropriated out of such Milk Commission account for the payment of all expenses incurred by the Milk Commission in administering and enforcing this act.

Section 11. Local milk boards.—(a) Members. For the purpose of securing the benefits of this act, in any market area, the producers and distributors and producer-distributors in that market area shall establish a milk board of five members to carry out the provisions of this act in conjunction with the State Milk Commission. Each local milk board shall be composed of two representatives of the producers supplying milk to the market, one of whom shall be named by the producers' co-operative marketing association operating in the market, and in markets where the producers' co-operative market association handles the selling of fifty per centum or more of the milk, the association shall have the right to name both representatives of the producers on the milk board; and two representatives of the distributors operating in the market. In markets where producer-distributors handle fifty per cent or more of the milk used in the market the Milk Commission shall determine the representation of the producers, the producer-distributors and distributors on the milk board on a basis fair to all parties.

The Milk Commission shall appoint the fifth member of the milk board to represent the consumers and the public interest, who shall serve as chairman of the board. The representative of the consumers and the public interest shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom.

(b) Expenses. The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board

as necessary to cover its expenses. All assessments shall be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds.

(c) Powers. The milk board shall perform such functions as the Milk Commission shall delegate to it.

Section 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. Prosecutions for violating the provisions of this act shall be instituted by the Commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of this act are in effect.

Section 14. Saving clause.—No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

Secion 15. Conflicting laws.—The making of marketing agreements between producers' co-operative marketing as-

sociations and distributors and producer-distributors under the provisions of this act shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily nor shall the marketing contract or agreements between the association and the distributors and producer-distributors, or any agreements authorized in this act, be considered illegal or in restraint of trade. All laws or parts of laws in conflict with the provisions of this act are hereby repealed to the extent necessary for the full operation of this act.

Section 16. Constitutionality.—If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

Section 17. Termination.—The period of public emergency during which this act shall be effective shall be until such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session the date so designated by a proclamation of the Governor.

2. An emergency existing, this act shall be in force from its passage.